



**FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS**

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The Committee solicits comment on the following proposal by January 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes amending several controlled substances instructions, M Crim JI 12.2, 12.3, 12.5 and 12.6, and adding a new instruction, M Crim JI 12.4a, to accommodate a change in the law announced in *People v Robar*, ___ Mich App ___ (2017), holding that the burden of persuasion was on a defendant to prove an exemption to the Controlled Substances Act. Deletions from the current instructions are struck-through; additional language is underlined.

[AMENDED] M Crim JI 12.2 Unlawful Delivery of a Controlled Substance

(1) The defendant is charged with the crime of illegally delivering [(*state weight*) of a mixture containing] a controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant delivered [*identify controlled substance*].

(3) Second, that the defendant knew that [he / she] delivered a controlled substance.

[(4) Third, that the controlled substance that the defendant delivered [was in a mixture that] weighed (*state weight*).]¹

~~[(5) {Third / Fourth}, that the defendant was not legally authorized to deliver this substance.]²~~

~~[(6)–“Delivery” means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was a controlled substance and intending to transfer it to that person. [An attempt has two elements.~~

~~First, the defendant must have intended to deliver the substance to someone else. Second, the defendant must have taken some action toward delivering the substance, but failed to complete the delivery. It is not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal.]~~³²

Use Note

Because the statutory definition of delivery includes actual, constructive, or attempted transfer of a substance, attempted delivery is not a lesser included offense. MCL 333.7105(1).

If the defense presents competent evidence that the defendant was authorized to deliver the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ____ Mich App ____, ____ NW2d ____ (Aug 24, 2017).

1. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

~~2. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).~~

³². Use bracketed material defining attempt only in cases involving act falling short of completed delivery. Any attempt is a specific intent crime. *People v Joeseype Johnson*, 407 Mich 196, 239, 284 NW2d 718 (1979) (opinion of Levin, J.).

McFadden v United States, 576 US ____; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular

controlled substance, only that he or she intended to deliver some controlled substance.

[AMENDED] M Crim JI 12.3 Unlawful Possession of a Controlled Substance with Intent to Deliver

(1) The defendant is charged with the crime of illegally possessing with intent to deliver [*state weight*] of a [mixture containing a] controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed¹ [*identify controlled substance*].

(3) Second, that the defendant knew that [he / she] possessed a controlled substance.

(4) Third, that the defendant intended to deliver the controlled substance to someone else.

(5) Fourth, that the controlled substance that the defendant intended to deliver [was in a mixture that] weighed (*state weight*).²

~~[(6) Fifth, that the defendant was not legally authorized to deliver the controlled substance.]³~~

Use Note

If the defense presents competent evidence that the defendant was authorized to deliver the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ___ Mich App ___, ___ NW2d ___ (Aug 24, 2017).

1. For a definition of possession, see M Crim JI 12.7.

2. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

~~3. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).~~

[AMENDED] M Crim JI 12.5 Unlawful Possession of a Controlled Substance

(1) The defendant is charged with the crime of knowingly or intentionally possessing [(state weight) of a mixture containing] the controlled substance, [identify controlled substance]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed¹ [identify controlled substance].

(3) Second, that the defendant knew that [he / she] possessed a controlled substance.

[(4) Third, that the substance that the defendant possessed [was in a mixture that weighed (state weight).]²

~~[(5) [Third / Fourth], that the substance was not obtained by a valid prescription given to the defendant.]³~~

~~[(6) [Third / Fourth / Fifth], that the defendant was not otherwise authorized to possess this substance.]⁴~~

Use Note

If the defense presents competent evidence that the defendant had a valid prescription or was otherwise authorized to possess the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ___ Mich App ___, ___ NW2d ___ (Aug 24, 2017).

1. For a definition of possession, see M Crim JI 12.7.

2. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

~~3. This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription for the substance. See *People v Little*, 87 Mich App 50, 54-55, 273 NW2d 583 (1978), and Use Note 4 below.~~

~~4. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must~~

~~prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).~~

[AMENDED] M Crim JI 12.6 Unlawful Use of a Controlled Substance

(1) The defendant is charged with the crime of illegally using a controlled substance, _____. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant used a controlled substance.

(3) Second, that the substance used was _____.

(4) Third, that at the time [he / she] used it, the defendant knew the substance was _____.

~~[(5) Fourth, that the substance was not obtained by a valid prescription given to the defendant.]¹~~

~~[(6) Fifth, that the defendant was not otherwise authorized by law to use this substance.]²~~

Use Note

If the defense presents competent evidence that the defendant had a valid prescription or was otherwise authorized to use the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ____ Mich App ____, ____ NW2d ____ (Aug 24, 2017).

~~1. This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription. See *People v Little*, 87 Mich App 50, 54-55, 273 NW2d 583 (1978), and Use Note 2 below.~~

~~2. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278, 523 NW2d 325 (1994).~~

[NEW] M Crim JI 12.4a Exception to or Exemption from Controlled Substances Act

(1) The defendant has offered evidence that [he / she] [had a valid prescription for / was authorized to (manufacture / deliver / possess / use)] [identify the controlled substance charged]. [Describe evidence].

(2) The defendant has the burden of proving [he / she] [had a valid prescription for / was authorized to (manufacture / deliver / possess / use)] [identify the controlled substance charged] by a preponderance of the evidence. This means that the evidence must persuade you that it is more likely than not that [he / she] [had a valid prescription for / was authorized to (manufacture / deliver / possess / use)] [identify the controlled substance charged].

(3) If you find that the defendant [had a valid prescription for / was authorized to (manufacture / deliver / possess / use)] [identify the controlled substance charged], you must find [him / her] not guilty.

(4) If you find that the defendant [did not have a valid prescription for / was not authorized to (manufacture / deliver / possess / use)] [identify the controlled substance charged], you must still determine whether the prosecutor has proved the elements of the charge beyond a reasonable doubt.

Use Note

This instruction must be used if the defense presents competent evidence that the defendant had a valid prescription for, or was otherwise authorized to manufacture, possess or use, the controlled substances. See *People v Robar*, Mich App ___, NW2d ___ (Aug 24, 2017).

Prescription possession or use of a controlled substance is excepted from a criminal violation of the Controlled Substances Act under MCL 333.7403(1) or MCL 333.7404(1), respectively. Exemptions to manufacturing or delivering controlled substances are found in MCL 333.7303 and 333.7304.